STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 14, 2005
v	No. 251512 Wayne Circuit Court
ELBERT SCOTT, Defendant-Appellant.	LC No. 03-007439-01

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to natural life in prison for the first-degree premeditated murder conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. We affirm, but remand for administrative correction to amend defendant's judgment of sentence to award him credit for time served against his felony-firearm conviction.

I. Sufficiency of Evidence

Defendant contends that the prosecution presented insufficient evidence of premeditation to support his conviction of first-degree premeditated murder. We disagree.

A. Standard of Review

In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004).

B. Analysis

The elements of first-degree murder are that the defendant killed the victim and that the killing was "willful, deliberate, and premeditated." *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002), citing MCL 750.316(1)(a). To establish premeditation and deliberation, the prosecution must show the existence of time between the initial homicidal intent and the ultimate action. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). The interval

should be long enough to afford a reasonable person time to take a second look. *Id*. Where the evidence establishes a fight and then a killing, there must be a showing of a thought process which is not disturbed by hot blood. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). The elements of premeditation and deliberation require "substantially more reflection on and comprehension of the nature of the act than the mere amount of thought necessary to form the intent to kill." *Id*. The defendant must have had time to take a "second look" or to "pause between the thought and the action itself." *Id.* at 300-301. Proof of motive is not essential. *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). The jury can infer premeditation and deliberation, as well as intent, from the circumstances of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *Plummer, supra*. Moreover, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *Fennell, supra,* at 270-271.

In determining whether a defendant acted with premeditation, the trier of fact may consider "(1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *People v Moore*, 262 Mich App 64, 77; 683 NW2d 736 (2004). After reviewing the record in light of these factors, we conclude that the prosecutor presented sufficient evidence of premeditation and deliberation.

Viewed in a light most favorable to the prosecution, the evidence supports a rational jury's finding that defendant, along with Jennifer Brown, planned to kill Rodgers, with whom Jennifer Brown had been feuding for a substantial period of time over a man. On the morning of the incident, defendant and three other women, including Jennifer Brown, went to Rodgers' mother's house in defendant's white truck. Rodgers was not home at that time. Defendant came out of the truck, walked up to Rodgers' sister, Jennifer Appling, pointed his finger at her face, and cursed her, while the women from defendant's truck threw bricks and sticks at Appling and her van. Defendant had a gun in his waistband. When defendant and the women got back into the truck and were about to pull off, Jennifer Brown said, "[D]on't worry because we gon [sic] leave [Rodgers'] brains ground on the ground [sic] -- in the street." A few minutes later, when Appling drove her van to her brother's house two blocks away, defendant and the women in defendant's white truck followed her and told her, "[W]e not [sic] looking for you. We want your sister. We gone [sic] leave her brain laying [sic] in the street."

That afternoon, when Rodgers and others in Appling's van stopped at a stop sign at Dacosta and Puritan on the way to Monia Hardy's house, Jennifer Brown ran out of a house carrying "a pole to a fence," and she and other people behind the van yelled and threw objects at the van. Rodgers got out of the van and ran toward Jennifer Brown. Rodgers was screaming, hollering and throwing her hands up and down, but she had nothing in her hands. Rodgers did not get further than the middle of the street and did not get close enough to actually engage in a fight with Jennifer Brown. Defendant then ran out of the side of a house with his hand concealed underneath his shirt. Rodgers did not approach defendant, but when defendant got close enough to Rodgers, he pulled the gun out and pointed it toward her. Jennifer Brown yelled at him to "shoot that bitch." Approximately one or two seconds later, defendant shot Rodgers in the face, fatally injuring her. The circumstances surrounding the killing provide strong support for a finding of premeditation and deliberation. *Moore, supra*. Indeed, that the jury could rationally have concluded that defendant deliberately shot Rogers in the face in a manner consistent with

previous threats that Rogers' brains would be on the street, soundly establishes defendant's premeditation. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could have concluded that sufficient evidence was produced to prove that the killing was "willful, deliberate, and premeditated." MCL 750.316(1)(a).

II. Ineffective Assistance of Counsel

Defendant argues that defense counsel was ineffective for failing to adequately prepare for trial and present defendant's self-defense theory. We disagree. Because defendant did not move for a *Ginther*[1] hearing, this Court's review of defendant's ineffective assistance of counsel claim is limited to the mistakes apparent on the record. *People v Sabin (On Second Remand),* 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v Toma,* 462 Mich 281, 302; 613 NW2d 694 (2000), and the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers,* 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *People v Solmonson,* 261 Mich App 657, 663; 683 NW2d 761 (2004).

Specifically, defendant alleges that his counsel was ineffective in failing to produce the missing witnesses, Tiffany Lee, Mary Brown, Tina Brown and Joanne Brown, to support counsel's self-defense theory. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy that this Court will not second-guess. *People v Dixon,* 263 Mich App 393, 398; 668 NW2d 308 (2004). Failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *Id*. Also, the "defendant has the burden of establishing the factual predicate for his claim," and "to the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record" that supports the claim. *People v Hoag,* 460 Mich 1, 6; 594 NW2d 57 (1999). Here, the record suggests that defense counsel attempted to locate those missing witnesses. Counsel also asked the court for assistance in locating them. Defendant has failed to show that any additional effort by trial counsel would have produced the witnesses. In fact, even after the court ordered the prosecutor and the officer-in-charge to help counsel locate them, neither counsel nor the prosecutor could locate the witnesses to obtain their testimony. Further, defendant does not provide any evidence to demonstrate how the witnesses testimony could have been favorable to him. *Hoag, supra*. Defendant only speculates that their testimony regarding the prior incident that allegedly took place between him and Rodgers would be favorable. Defendant therefore has failed to prove that defense counsel's failure to produce the witnesses prejudiced the defense.

[1] *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant also argues that his counsel was ineffective in failing to call him to testify in his own defense. Initially, we note that defendant at trial waived his right to testify. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). Additionally, he fails to indicate either the substance of his testimony or how it would have affected the outcome of the case. Further, defendant's decision not to testify is presumed to be a matter of trial strategy, which this Court will not second-guess. See *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). We cannot conclude defense counsel was ineffective in failing to call defendant to testify.

Last, nothing in the record indicates that defendant's attorney did not adequately present defendant's self-defense theory. Defense counsel questioned the police officers numerous times throughout the trial regarding the prior incident that allegedly took place between defendant and Rodgers. Also, defense counsel questioned the witnesses numerous times regarding Tiffany Lee, as well as Rodgers and her friends' intent to confront defendant and Jennifer Brown. Defense counsel also stated, in her opening and closing arguments, that defendant acted out of self-defense to protect his own life and reasonably believed that he was in "a very potentially dangerous scene." Contrary to defendant's argument, counsel's closing argument was based on substantial testimony that counsel adduced during the trial. Thus, defendant failed to provide any evidence to overcome the presumption that trial counsel performed adequately. *Dixon, supra*. In addition, the court instructed the jury on self-defense. Given the overwhelming evidence of defendant's guilt and the jury instruction on self-defense, defendant failed to meet the burden of proving that his counsel's performance prejudiced his defense such that it denied him a fair trial. *Solmonson, supra*.

III. Prosecutorial Misconduct

Defendant claims that he was denied a fair trial because the prosecutor's remarks during her closing rebuttal argument constituted misconduct. We disagree. A prosecutorial misconduct claim is a constitutional issue which is reviewed de novo, but the trial court's factual findings are reviewed for clear error. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant asserts that the prosecutor improperly denigrated defense counsel when she argued, "Ladies and gentlemen, as I sat here listening to counsel give her closing argument it just became apparent to me that she was standing up here trying to convince herself of a defendant's innocence." The trial court sustained defense counsel's objection and ordered the jury to disregard the remark. Defendant also asserts that the prosecutor improperly questioned defense counsel's veracity by arguing,

> There was testimony in this case that [Rodgers] got out, Jennifer Brown as per usual, she and Jennifer Brown were approaching each other. That's all that happened. Not two car loads full of women and some of whatever counsel said. It just didn't happen, ladies and gentlemen and you have to base your verdict on what actually happened, what the evidence is in this case.

Then counsel tells you in such a genuine tone, I'm really sorry.

Defense counsel objected, but the trial court ruled that "—hold on. It's not viewed as a tactic[,] it's argument." Defendant asserted that the prosecutor continued to personally attack defense counsel by arguing:

> She says, I'm very troubled by Jennifer Appling's testimony. And then she indicates that she can't imagine what Jennifer Appling would have been going through observing the defendant murder her sister.
>
> Then counsel has the temerity to --.

Counsel objected to the prosecutor's remarks and the court noted counsel's objection.

Generally, "a prosecutor may not personally attack defense counsel because this type of attack can infringe upon the defendant's presumption of innocence." *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). Nor may a prosecutor suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). However, improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). In determining whether an invited response merits reversal, a court should consider the conduct which prompted the prosecutorial response and the proportionality of that response. *Id*.

After reading the prosecutor's remarks in context, we hold that defense counsel's closing argument clearly invited the prosecution's challenged remarks in rebuttal. *Jones, supra*. During her closing argument, defense counsel attacked the credibility of the prosecution's witnesses, arguing, "Their own testimony doesn't make sense, but given in the context of the fact that they have 'A,' changed their stories, they've lied. They have deliberately tried to mislead you and the police investigation in trying to determine exactly what went on there that day. And there's a reason that they are deliberately manipulating the truth." Specifically, counsel doubted Appling's testimony that car loads of people were innocently driving down the street. While expressing her sympathy toward Appling, counsel questioned whether the incident would have occurred had Appling not told Rodgers about her confrontation with defendant earlier on the day of the shooting.

We find that the prosecutor's challenged remarks were a fair response to defense counsel's personal attack on the prosecution's witnesses, specifically Appling for deliberately lying and manipulating her story because she was culpable for telling Rodgers about her confrontation with defendant and accompanying Rodgers to confront defendant. *Jones, supra*, at 353 n 6. In response to counsel's argument that Appling and other witnesses lied about having no intent to confront defendant, the prosecutor urged the jury to focus on the evidence and base its verdict "on what actually happened, what the evidence is in this case." The prosecutor then merely indicated that defense counsel attempted to express her sympathy toward Appling and to blame her rather than defendant. Because the prosecutor's challenged remarks were made in rebuttal to defense counsel's closing argument, we find no error requiring reversal of defendant's conviction. *Id.* at 352-353

Moreover, this Court will not find any error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Here, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, but are to assist the jury in understanding the evidence and each side's legal theories. The trial court also instructed that the jurors should only accept the lawyers' assertions that are supported by evidence or by their own common sense and everyday experience. Jurors are presumed to follow the trial court's instructions. *Abraham*, *supra*, at 279. Thus, the trial court's instructions dispelled any prejudice arising from the prosecutor's comments, and defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995); *Watson, supra*, at 586.

IV. Sentencing

Defendant asserts that the trial court failed to award him credit for time served against his felony-firearm conviction. On appeal, the prosecution concedes the point.

MCL 769.11b, provides that:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Defendant's PSIR indicates that he is entitled to a credit of 102 days for time served from June 11, 2003, to September 29, 2003. The trial court did not award defendant credit for any jail time against his felony-firearm sentence. Therefore, we conclude that defendant is entitled to an award of credit for time served against his felony-firearm conviction. However, resentencing is not required. Rather, we remand for administrative correction to amend defendant's judgment of sentence to award him credit for time served against his felony-firearm conviction.

Affirmed, but remanded for administrative correction to amend defendant's judgment of sentence to award him credit for time served against his felony-firearm conviction. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Pat M. Donofrio